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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 709

~~PROVIDENT SECURITY LIFE INSURANCE COMPANY~~, and JOHN S. GORSUCH and ALBERT J. DOIG, *Petitioners*

v.

ANGUS J. DEPINTO, HJALMAR B. LANDOE, FRANCIS I. SABO, EDWIN B. PEGRAM and ELMER W. DUHAME, ET AL *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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[illegible]NTO, HJALMAR B. LANDOE, FRANCIS I. [illegible]B. PEGRAM and ELMER W. DUHAME, ET AL., *Respondents*

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JURY ISSUE

[illegible]tly a Shareholder's Derivative Suit.

[illegible]ion to its present posture, the action at [illegible] a shareholder's derivative action. It [illegible]garded by Respondents.[1] The district [illegible].[2] And the court of appeals similarly [illegible]f the two appeals.[3]

Civil Rule 39 Permits Challenge of Claim to Jury Trial.

The fact that Respondents did not waive jury trial under Civil Rule 38(d) is not controlling. Rule 39(a) specifically provides that when trial by jury has been demanded as provided in Rule 38, the trial of all issues so demanded shall be by jury, "unless" the parties stipulate to a court trial or "the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States." [4] Such a motion by Petitioners was timely made before trial.[5] It was granted by the district court after the case was tried to a jury,[6] when the trial court concluded that Petitioner's motion was well taken; that the case was equitable and hence a court case, and the verdicts should be treated only as advisory, and should be rejected since "they are not supported by any evidence whatever and they are not justified by any applicable legal principle." (App. A, p. 1a).

The fact that the trial court did not rule on Petitioner's motion until after trial cannot conceivably prejudice Respondents who had what they insisted upon—a jury trial. Only the grant of the motion (not the time of grant) could prejudice Respondents. And the court of appeals' reversal of the district court's grant precisely raises Petitioners' first question.

RULE 50 (b) ISSUE

Respondents' contention that the court of appeals weighed the evidence, and reversed the district court's entry of judgment n.o.v. on the ground that there was a triable issue of fact respecting damages is without support in the opinion.

First, if the court of appeals had reviewed the evidence, and had concluded that there was a triable issue of fact respecting damages, it would never have reached the constitutional question of additur and the Seventh Amendment. It is not a sound reading of a court of appeals' opinion to assume that it would seek out a constitutional question when the case could be disposed of on the simple ground that the evidence did not support the judgment n.o.v.

Second, the court of appeals' opinion, beginning at the last paragraph of page 27a of the Petition through page 30a, shows that it did not rest its decision that the trial court was without power to increase the jury verdict on the major premise that the damages were in dispute. The court of appeals knows that the standard in determining the correctness of a judgment n.o.v. is not whether a defendant has disputed the damages, but whether "the evidence is legally insufficient to support a verdict for the adverse party." And the court of appeals knows that this is a question of law; and depends on the state of the evidence rather than a defendant's claim that it disputes the damages or liability.

CROSS PETITIONS FOR CERTIORARI

Without agreeing with the propositions set forth in the two Cross Petitions, Petitioners do not object to the grant thereof, should the Court review the jury issue and the Rule 50(b) issue presented in the Petition. Despite the extended amendment of Rule 50 in 1963, adding subdivisions (c) and (d), these subdivisions do not deal with the issue raised in the Cross Petitions. Thus, although Petitioners disagree with the conclusions advanced by Cross Petitioners, in the interests of a full analysis of the issue of jury or court

trial in a stockholder's derivative action, and of the power of a court of appeals to order a new trial where no motion therefor was made, Petitioners agree that the writ of certiorari should be granted.

CONCLUSION

For the reasons stated in the Petition, as well as herein, the questions set forth in the Petition should be decided by this Court. The petition for a writ of certiorari filed by Petitioners should be granted.

Respectfully submitted,

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FOOTNOTES

[1] In the first appeal, Niesz v. Gorsuch, 295 F.2d 909 (C.A. 9th, 1961), Respondents asked for and obtained a reversal on the ground that the indispensable party defendant (the corporation United) in the stockholder's derivative action had been merged prior to trial.

[2] R. 1740: "This is a stockholder's derivative action."; R. 332: "This is a stockholder's derivative action . . ."

[3] The rulings are as follows:

(a) In Niesz v. Gorsuch, 295 F.2d 909 (C.A. 9th, 1961), the first appeal herein, the court of appeals in the first sentence of the opinion stated: "This *is* a stockholder's derivative action . . ."

(b) In DePinto v. Provident Security Life Insurance Company, 323 F.2d 826, the second appeal herein to which the Petition was addressed, the court of appeals held that where demand upon corporate directors to institute a direct suit would be futile, Petitioner Doig, as a shareholder, need not make such demand in a shareholder's derivative action.

(c) Also in DePinto v. Provident, the court of appeals ruled that Petitioner Doig could intervene "in this action as a plaintiff so that the remanded proceeding could continue as it had been up until then, a secondary action by a shareholder of a corporation" under Rule 23(b).

(d) Additionally, in DePinto v. Provident, the court of appeals, in referring to this action, said: "There is no applicable statute providing for a jury trial in *a stockholder's derivative action.*"

(e) Similarly, in DePinto v. Provident, the court of appeals said that a "stockholder's derivative action is an invention of equity to supply the want of an adequate remedy at law to redress breaches of fiduciary duty," and "in order to determine whether appellants were entitled to a jury trial in *this derivative action* . . ."

(f) Finally, in DePinto v. Provident, the court of appeals rejected a statute of limitations defense offered by Respondents holding instead that Doig's intervention "as a plaintiff in a class action brought by Gorsuch, and having introduced no new cause of action therein, the filing of the Gorsuch complaint inures to his benefit."

[4] Civil Rule 39(a) states:

Rule 39. Trial by Jury or by the Court.

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, *unless* (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

[5] R. 246.

[6] R. 313.

[7] Moore's Federal Rules Pamphlet (1963) at 1027; 5 Moore's Federal Practice § 50.12 at 2342-2343.

Respondents' new contention—that the damages of $314,794.19, sustained by United on October 18, 1957, cannot be measured by the value of the assets lost on that date because United received, in "exchange" for such assets, 30,800 shares of the capital stock of American—cannot be serious. The reasons are: (1) The 30,800 shares of Class A non-voting stock of American transferred to United on October 18, 1957, were shares in a corporation (American) which had been formed by Respondents Sabo, Pegram, and Landoe at 4:45 P.M. on October 17, 1957. (R. 235, 239); (2) American began business on October 18, 1957 with $52,000 which was contributed by Respondent Sabo of which $50,898.98 was used on that date to pay the seller of United stock in part payment of the purchase price thereby leaving American with $1,101.02 in cash, and a debt of $42,000 which it assumed. (R. 609-610, 618-619, Ex. 23); (3) The Senior Examiner of the Arizona Insurance Department who audited United for 1957 valued the said 30,800 shares of American stock at zero. (R. 1049-1051); (4) The transfer of the $314,794.19 of United's assets for the 30,800 shares of American stock rendered United insolvent. (R. 1054-1055); (5) The 30,800 shares of American non-voting valueless stock did not constitute an admitted asset under Arizona law. (R. 1054).

Subdivision (c) deals with the situation where there is both a motion for judgment n.o.v. and a motion for a new trial. But here Petitioner did not file a motion for a new trial. Subdivision (d) deals solely with the situation where a motion for judgment n.o.v. is denied. But here the district court granted rather than denied the motion for judgment n.o.v.